115 U.S. 524.

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. ~~914~~. 49

THE DAVIS SEWING MACHINE COMPANY OF WATERTOWN, N. Y., PLAINTIFF IN ERROR,

vs.

ANDREW ROTHWELL AND ALMARIN C. RICHARDS.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED OCTOBER 7, 1882.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 314.

THE DAVIS SEWING MACHINE COMPANY OF WATERTOWN, N. Y., PLAINTIFF IN ERROR,

vs.

ANDREW ROTHWELL AND ALMARIN C. RICHARDS.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

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JUDD & DETWEILER, PRINTERS, WASHINGTON.

1 *Declaration. Filed July 10th*, 1875.

In the Supreme Court of the District of Columbia, the 10th day of July, 1875.

THE DAVIS SEWING MACHINE COMPANY, of Watertown, New York, Plaintiff,
vs.
ANDREW ROTHWELL & ALMARIN C. RICHARDS, Def'ts.
} At Law. No. ——.

The plaintiff, a body politic and corporate under the laws of the State of New York, sues the defendants for money payable by the defendants to the plaintiff, for that whereas heretofore, to wit, on or about the 17th day of December, 1872, at Washington, District of Columbia, the defendants, for value received, did guarantee to the plaintiff the full performance of a certain contract or agreement on the part of a certain John W. Poler, made between the plaintiff and the said Poler, on or about the said 17th day of December, 1872, and

2 the payment by said Poler of all indebtedness by account, note, endorsement of note, (including renewals and extensions,) or otherwise, to the plaintiff, for property sold said Poler by the plaintiff, under said contract, to the amount of three thousand dollars; and the plaintiff avers that, confiding in said guarantee, promise, and undertaking of the said defendants, the said plaintiff did, in fact, sell and deliver to said Poler, on credit and in accordance with the terms and conditions of said contract or agreement, certain goods, sewing machines, and attachments, and at certain reasonable prices in and by said agreement or contract agreed upon by and between the plaintiff and the said Poler, amounting to the sum of three thousand dollars, and that although the said credit and time for payment of the price of said goods, sewing machines, and attachments, by the said Poler to the said plaintiff, hath long since elapsed, yet the said Poler hath not (although requested so to do) as yet paid the said sum of three thousand dollars, or any part thereof, but hath wholly neglected and refused so to do,

3 of all which promises the defendants afterward had due notice; yet the defendants, not regarding their said agreement, promise, and undertaking, but contriving and intending to deceive and defraud the said plaintiff in this behalf, have not as yet accounted to the plaintiff, or paid the said sum of three thousand dollars, or any part thereof, for said goods, sewing machines, and attachments, or any part thereof, to the plaintiff (although often requested by the plaintiff so to do), and have hitherto wholly neglected and refused, and still wholly neglect and refuse, so to do, and the said sum of three thousand dollars still remains wholly due and unpaid to the said plaintiff, and the plaintiff claims three thousand dollars, with interest thereon from the 9th day of July, 1874, besides costs of suit.

The plaintiff also sues the defendants for that the defendants, in consideration that the plaintiff would supply a certain John W. Poler with goods, sewing machines, and attachments on credit,

promised the plaintiff to be answerable to the plaintiff for
4 the same, and the plaintiff did accordingly supply the said Poler with goods, sewing machines, and attachments, to the price of three thousand dollars, on credit, which credit has elapsed, yet neither the said Poler nor the defendants have paid for said goods, sewing machines, and attachments, and the plaintiff claims three thousand dollars, with interest thereon from the 9th day of July, 1874, besides costs of suit.

The plaintiff also sues the defendants for money payable by the defendants to the plaintiff for goods bargained and sold by the plaintiff to the defendants, and for goods sold and delivered by the plaintiff to the defendants, and for money had and received by the defendants for the use of the plaintiff, and for money found to be due from the defendants to the plaintiff on accounts stated between them, and the plaintiff claims three thousand dollars, with interest thereon from the 9th day of July, 1874, besides costs of suit.

R. H. LASKEY,
Attorney for Plaintiff.

5 The defendants are to plead hereto on or before the first special term of the court, occurring twenty days after service hereof, otherwise judgment.

R. H. LASKEY,
Att'y for Plaintiff.

Summons. Issued July 10th, 1875.

In the Supreme Court of the District of Columbia. At Law. No. 14406

THE DAVIS SEWING MACHINE COMPANY, of Watertown, N. Y., Pl'ff,
vs.
ANDREW ROTHWELL and ALMARIN C. RICHARDS, Def'ts.

The President of the United States to the defendants, Greeting:

You are hereby commanded to appear in this court on the first day of its special term, occurring 20 days after service of this writ on you, to answer the plaintiff's suit, and show why he should not have judgment against you for the cause of action stated in his declaration.

Witness D. K. Cartter, Chief Justice.

6 [SEAL.] R. J. MEIGS, *Clerk,*
By JOB BARNARD, *Ass't Cl'k.*

NOTE.—The special terms of the court commence on the first Tuesday of every month, except August, in which month there is no term of the court.

On Back.

Served copies of the declaration, notice to plead, and this summons, on both the defendants the 12th day of July, 1875.

A. SHARP,
Marshal.

Demurrer of Defendants to 1st & 2-Count- of Declaration. Filed August 7th, 1875.

In the Supreme Court of the District of Columbia. At Law. No. 14406.

THE DAVIS SEWING MACHINE COMPANY, of Watertown, N. Y.,
vs.
ANDREW ROTHWELL, A. C. RICHARDS.

The defendants say the declaration is bad in substance in
7 the first count.

The defendants say the declaration is bad in substance in the second count.

Among the matters rendering the declaration bad is this: The defendants are sued for sewing machines alleged to have been furnished one John W. Poler, upon an alleged guarantee of a contract, not aver-ed to be in writing, and refer-ed to only as a certain agreement made on or about 17th December, 1872.

And also this: The declaration is uncertain and indefinite, and does not set forth any contract or breach thereof with sufficient precision.

And this: There is no sufficient allegation of notice to the defendants of either the alleged sale of machine or failure on part of Poler to pay in the first count, and none in the second.

WILLIAM A. COOK,
Att'y for Def'ts.

Plea to 3rd Count of Declaration. Filed August 7th, 1875.

8 In the Supreme Court of the District of Columbia. At Law. No. 14406.

THE DAVIS SEWING MACHINE COMPANY, Watertown, New York,
vs.
ANDREW ROTHWELL, A. C. RICHARDS.

The defendant says (1) he never was indebted as alleged in the third count of plaintiff's declaration, and (2) that he did not promise as alleged therein.

WILLIAM A. COOK,
Att'y for Def'ts.

Joinder of Issue. Filed January 7th, 1876.

In the Supreme Court of the District of Columbia, the —— day of January, 1876. At Law. No. 14406.

THE DAVIS SEWING MACHINE COMPANY, of Watertown, New York, Plaintiff,
vs.
ANDREW ROTHWELL & ALMARIN C. RICHARDS, Def'ts.

9 The plaintiff joins issue upon the defendants' pleas.

R. H. LASKEY,
Att'y for Plaintiff.

Joinder in Demurrer. Filed January 7th, 1876.

In the Supreme Court of the District of Columbia, the 7th day of January, 1876. At Law. No. 14406.

THE DAVIS SEWING MACHINE COMPANY, of Watertown, New York, Plaintiff,

vs.

ANDREW ROTHWELL & ALMARIN C. RICHARDS, Def'ts.

The plaintiff says the declaration is good in substance in the first and second counts.

R. H. LASKEY,
Att'y for Plaintiff.

Note of Issue. Filed January 7th, 1876.

10 In the Supreme Court of the District of Columbia, the 7th day of January, 1876. At Law. No. 14406.

THE DAVIS SEWING MACHINE COMPANY, of Watertown, N. Y.,

vs.

ANDREW ROTHWELL & ALMARIN C. RICHARDS, Def'ts.

R. H. Laskey, attorney for plaintiff; Wm. A. Cook, attorney for defendants.

Last pleading filed the 7th day of January, 1876.

R. H. LASKEY,
Att'y for Plaintiff.

To the clerk.

Proceedings before the supreme court of the District of Columbia, holding a special term and circuit court in and for said District, commencing the fourth Monday, 22nd day of January, 1877.

MONDAY, *January* 22, A. D. 1877.

By order of Chief Justice Cartter, presiding, one of the justices of said supreme court, the court is opened by proclamation of the marshal, pursuant to rule of court.

11 SATURDAY, *April* 21, 1877.

Session resumed pursuant to adjournment, Chief Justice Cartter presiding.

At Law. No. 14,406. Cal. 285.

THE DAVIS SEWING MACHINE CO., Pl'ff,

vs.

ROTHWELL & RICHARDS, Def'ts.

Now come here the defendants, by their attorney, Mr. Cook, and, by leave of the court, withdraw their demurrer filed in this case.

Appearance of Jas. G. Payne for Plaintiff. Filed September 18th, 1878.

In the Supreme Court of the District of Columbia. At Law. No. 14406.

THE DAVIS SEWING MACHINE CO.
vs.
ROTHWELL & RICHARDS.

The clerk will enter my appearance for the plaintiff in this cause.

JAS. G. PAYNE,
Att'y for Pl'ff.

Additional Pleas. Filed April 6th, 1878.

12 In the Supreme Court of the District of Columbia. At Law, No. 14406.

THE DAVIS SEWING MACHINE CO., of Watertown, New York,
vs.
ROTHWELL & RICHARDS.

1. The defendants say that they never were indebted as alleged.
2. That they never promised as alleged.
3. That the plaintiff is not a body corporate or politic, as set forth in said declaration.
4. That by the terms of a certain contract the plaintiff entered into with one John W. Poler, for whom these defendants are sureties, on the 17th day of December, 1872, said plaintiff bound itself to deliver in good order certain machines; that they should deliver the same to the said Poler, but that heretofore, to wit, during the period of the past three years and since the giving of the note in said declaration mentioned and sued upon, certain machines were delivered to the said Poler by the plaintiff which were not in good order, and were so worthless and contrary to the representation of the plaintiff made there about as to their
13 perfect adaptation to certain kinds of work, as to injure the confidence of the public in the working capacities of the said machines, and otherwise ruin the sale of said machines, by which fraudulent and wilful misrepresentations of the plaintiff the sale of said machines has been wholly stopped, and the said Poler injured in his dealing in connection with the sale of such machines to a great extent; and by said misrepresentations, made as aforesaid, destroying the confidence of the public in said machines, the said Poler has been prevented from selling others of said machines delivered to the said Poler by said plaintiff not in good order, to wit, seven (7) sewing machines which were by the effect of said fraudulent misrepresentations left on the hands of said Poler without any sale therefor; and the defendants claim by said breach of contract by the plaintiff their principal has been greatly dam-

aged, to wit, in the sum of five thousand ($5,000) dollars, and
14 they are willing that the same may be set off against the plaintiff's demand.

W. A. COOK,
W. WHEELER,
Att'ys for Def'ts.

Joinder of Issue. Filed May 8th, 1878.

In the Supreme Court of the District of Columbia. At Law.. No. 14406.

THE DAVIS SEWING MACHINE COMPANY, of Watertown, New York,

vs.

ANDREW ROTHWELL & ALMARIN C. RICHARDS.

The plaintiff joins issue upon each of the defendants' four pleas, filed 6th April, 1878.

PAYNE & LASKEY,
Att'ys for Plaintiff.

Proceedings before the supreme court of the District of Columbia, holding a special term and circuit court in and for said District, commencing on the fourth Monday, 27th day of January, 1879.

15 MONDAY, *January* 27, 1879.

By order of Cartter, chief justice, one of the justices of said court presiding, the court is opened by proclamation of the marshal, pursuant to rule of court.

TUESDAY, *February* 25, 1879.

Session resumed pursuant to adjournment, Cartter, chief justice, presiding.

At Law. No. 14406. Cal. 91.

THE DAVIS SEWING MACHINE Co., Pl'ff,

vs.

ANDREW ROTHWELL & ALMARIN C. RICHARDS, Def'ts.

Now comes here, as well the plaintiff, by its attorneys, Messers. Payne and Laskey, as the defendants, by their attorneys, Messers. Cook and Wheeler, and a jury of good and lawful men of this District, to wit: William H. Diggs, David Fisher, Sr., William Jordan, George T. Bassett, Charles H. Payne, James W. Colley, Isaac B. Lumsford, Joseph Ashford, Cornelius Clark, Frederick W. Pratt, James H. Clarke, and John W. Gray, who, being duly sworn to try the issue above joined, are respited until the meeting of the
16 court to-morrow.

WEDNESDAY, *February* 26, 1879.

Session resumed pursuant to adjournment, Cartter, chief justice, presiding.

At Law. No. 14406. Cal. 91.

THE DAVIS SEWING MACHINE CO., Pl'ff,
vs.
ANDREW ROTHWELL & ALMARIN C. RICHARDS, Def'ts.

Now again come here the parties aforesaid, in manner aforesaid, and the same jury that was respited yesterday, who, after the case is given them in charge, on their oath say, they find the issue aforesaid in favor of the defendants. Therefore, it is considered that the plaintiff take nothing by its suit, and that the defendants go thereof without day, and recover against said plaintiff the costs of their defence, taxed at $45.35, and have execution thereof.

Motion on Exceptions to set aside Verdict. Filed March 25th, 1879.

17 In the Supreme Court of the District of Columbia. At Law. No. 14406.

THE DAVIS SEWING MACHINE COMPANY
vs.
ANDREW ROTHWELL & ALMARIN C. RICHARDS.

Now comes the plaintiff, by its attorneys, and, upon exceptions taken at the trial of said cause, moves the court to set aside the verdict of the jury herein for errors of law as shown by said exceptions.

R. H. LASKEY,
JAS. G. PAYNE,
Att'ys for Plaintiff.

SATURDAY, *April* 19, 1879.

Session resumed pursuant to adjournment, Cartter, chief justice, and Cox, justice, presiding.

At Law. No. 14406.

THE DAVIS SEWING [MACHINE] COMPANY, Pl'ff,
vs.
ROTHWELL & RICHARDS, Def'ts.

Upon argument of the plaintiff's motion for a new trial on exceptions, it is considered that said motion be, and the same is hereby, overruled; from which the plaintiff appeals to the gen-
18 eral term.

Bill of Exceptions. Filed May 10th, 1879.

In the Supreme Court of the District of Columbia.

THE DAVIS SEWING MACHINE COMPANY
vs.
ANDREW ROTHWELL & A. C. RICHARDS, } At Law. No. 14406.

Upon the trial of this case, the plaintiff, to maintain the issue joined on his part, proved the corporate existence of the plaintiff and also the execution by one John W. Poler, of an agreement dated Decem-

ber 17th, 1872, and the execution by the defendants of a bond or guarantee annexed to the said agreement, and bearing the same date. Whereupon said agreement and bond or guarantee were offered and read in evidence as follows:

It is agreed that all sales of sewing machines, parts thereof, ac-
19 cessories thereto, or other property necessary for use in a sewing machine agency, which The Davis Sewing Machine Company, of Watertown, New York, parties of the first part, shall make to John W. Poler, of Washington, D. C., party of the second part, shall be upon the terms and conditions following, unless it shall be otherwise, in writing, hereafter agreed, during the continuance of this contract.

All indebtedness, by account, note, endorsement, or otherwise, which shall arise under this contract from said second party to said Davis Sewing Machine Company shall be paid at prices named, and the time and manner hereinafter stated.

First. Machines will be packed for transportation and delivered in good order to the transportation company in ———— by the said Davis Sewing Machine Company, after which all expenses of every kind will be paid by said second party.

Second. Said second party shall reasonably advertise, and make all reasonable efforts to sell, at prices not less than the regular
20 retail prices of said company, and shall introduce, supply, and sell said machines as speedly, thoroughly, and extensively as practicable through local, travelling, and sub-agents throughout the District of Columbia, and the counties of Prince George and Montgomery, in the State of Maryland.

Third. Said Davis Sewing Machine Company will, during the continuance of this agency, sell its machines and attachments to said second party at a discount of 40 per cent. from the regular retail prices of the machines and attachments at date of shipment (excepting the No. 6 cabinet cases, on which the discount will be 30 per cent.), and agree to accept payment for same in manner following, to wit:

21 Second. Said Davis Sewing Machine Company will make an additional discount of 10 per cent. from net amount of all bills paid in full by cash within 30 days from date of such bill.

Third. All invoices not paid by notes, as above provided, shall be due and payable six months from date.

Fourth. Said second party agrees not to engage in the sale of sewing machines of any other manufacture during the continuance of this contract.

22 Fifth. So long as the said second party shall conduct this business properly, energetically, and to the satisfaction of the Davis Sewing Machine Company, no other local agent for the sale of said sewing machine will be established in said territory. If said Davis Sewing Machine Company shall not be satisfied with the conduct of said business and agency by said second party they may establish another agency in his stead at pleasure. Said second party may discontinue this agency at pleasure, on notice, after settling all indebtedness to the company in full or by note.

Sixth. Said second party, in consideration of the covenants herein named, does hereby waive all his claim to exemption of property from execution, as provided for by the laws of the State of ——.

In witness whereof, the parties hereunto have set their hands and seals, this seventeenth day of December, 1872, in the presence of—

Witness: J. T. STEVENS.

23 JOHN W. POLER. [SEAL.]
DAVIS SEWING MACH. CO.,
L. A. JOHNSON, *Treas.* [SEAL.]

Bond.

For value received we hereby guarantee to the Davis Sewing Machine Company, of Watertown, N. *W.*, the full performance of the foregoing contract on the part of John W. Poler, and the payment by said John W. Poler of all indebtedness, by account, note, endorsement of notes (including renewals and extensions), or otherwise, to the said Davis Sewing Machine Company, for property sold to said John W. Poler, under this contract, to the amount of three thousand ($3,000) dollars.

Dated Washington, D. C., this 17th day of December, 1872.

The words "three thousand" erased and the words John W. Poler interlined above before execution.

A. ROTHWELL.
A. C. RICHARDS.

Witness for A. Rothwell—
GEO. W. ROTHWELL.
WM. G. BROCK,
Witness for A. C. Richards.

I consider the above sureties entirely responsible.

J. T. STEVENS.

24 Washington, December 19th, 1872

The plaintiff further offered proofs to show that subsequent to the said 17th day of December, 1872, the said agreement and bond or guarantee were forwarded to the plaintiff company, and the said agreement was afterwards signed by said plaintiff.

And further proof tending to show that the plaintiff thereafter, to wit, between said 17th day of December, 1872, and October, 1874, furnished to the said John W. Poler sewing machines and property amounting to $3,506.72 (including sewing machines and property received by said Poler from Euler and Stone, former agents of the plaintiff at Washington, D. C., and for which said Poler gave his receipts to said Euler and Stone, who transmitted them to plaintiff.)

And further proof tending to show that there was allowed to the said Poler by plaintiff for extra discounts and merchandise returned the sum of $132.85, and payments made by said Poler amount-

25 ing to $752.13. That the said Poler gave notes for portions of his said indebtedness at various times, some of which notes

were paid and are included in the cash payments above mentioned. That there were unpaid of the said notes amounting to $1,483. That in January, 1875, the said Poler and the attorney or agent of the plaintiff at Washington, D. C., had a settlement showing the amount then due from the said Poler to the plaintiff to be about $2,700. Said plaintiff made efforts to collect the said indebtedness from the said Poler, but failed to do so. That about the said month of January, 1875, the plaintiff, by its agent or attorney at Washington, notified the defendants of the indebtedness and default of the said Poler, and demanded payment from them, which was refused. The plaintiff then offered in evidence and read the said notes of the said Poler, amounting to $1,483, exclusive of interest.

26 The defendants, to maintain the issue on their part, proved that at the time of the execution of the said guarantee or bond by the defendants the alleged contract or agreement between Poler and the plaintiff had not then been executed by the plaintiff, but was delivered by the defendants to Poler after it was executed by them, and by Poler to Stevens, the plaintiff's attorney, then residing in Washington, who subsequently sent it to plaintiff in New York, with a recommendation that the guarantors were good.

That the defendants were never notified of the execution of the said contract by the plaintiff or the acceptance by it of the guarantee, and that they never had any notice or knowledge whatever that plaintiff furnished said Poler any goods or merchandise in pursuance of such contract, or on the faith of said guaranty, until the month of January, 1875.

That at the time of the execution of the alleged guaranty by the defendants, the plaintiff had furnished no goods or merchandise to said Poler, and that the negotiations then pending between

27 Poler and plaintiff related to prospective transactions between them.

And further evidence to prove that a large portion of the indebtedness for which the said notes were given had become due and payable by the terms of the contract before the said notes were given, and that said notes were given and taken without the knowledge or consent of the defendants.

The record of cause No. 13743, at law, in this court, was also produced, showing that the plaintiff on 23d day of February, 1875, instituted suit in this court against Poler alone, for the recovery of the indebtedness sued for in this action, to which said Poler appeared and made defence; and that the said suit was never prosecuted to a final determination.

And thereupon the court, at the instance of the defendants, instructed the jury as follows:

"It appearing that at the time the defendants signed the guaranty on the back of the contract between the plaintiff and Poler that the plaintiff had not executed the contract or assented thereto,

28 and that the contract and guaranty related to prospective dealings between the plaintiff and Poler, and that subsequently to the signing thereof by the defendants the attorney for

the plaintiffs approved the responsibility of the guarantors and sent the contract to Watertown, N. Y., to the plaintiff, which subsequently signed it, and no notice having been given by the plaintiff to the defendant of the acceptance of such contract and guaranty, and that it intended to furnish goods thereon and hold the defendants responsible, the plaintiff cannot recover, and the jury should find for the defendant." To which instruction the said plaintiff excepted before the jury retired to consider their verdict, which was finally given for the defendant, and the said exception was then and there noted upon the minutes of the judge; and the plaintiff prays the court to sign and seal this the first bill of exception, which is accordingly done now for them, this 10th day of May, 1879.

D. K. CARTTER, [SEAL.]
Chief Justice.

29 Proceedings before the supreme court of the District of Columbia, in general term, commencing on Monday, the 19th day of April, 1880. Present Chief Justice Cartter, and Justices Wylie and Cox.

FRIDAY, *April 30th*, 1880.

Session resumed pursuant to adjournment, present, Justices Wylie, Hagner, and Cox.

THE DAVIS SEWING MACHINE COMPANY, of Watertown, Pl'ff,
vs.
ANDREW ROTHWELL & ALMARIN C. RICHARDS, Def'ts. } At Law. No. 14406.

Argued by Mr. Payne for complainant, and Mr. Cole for defendants, and submitted to the court.

MONDAY, *May* 17, 1880.

Session resumed pursuant to adjournment, present, Chief Justice Cartter, and Justices Wylie, Cox, MacArthur, and James.

30 THE DAVIS SEWING MACHINE COMPANY, of Watertown, Pl'ff,
vs.
ANDREW ROTHWELL & ALMARIN C. RICHARDS, Def'ts. } At Law. No. 14406.

And now again come here as well the plaintiff as the defendants, by their respective attorneys, and thereupon, because it appears to the court here that *that* there is no error in the record and proceedings, or in the judgment of the special term, therefore it is considered by the court here that the judgment of the special term be, and the same is hereby, affirmed with costs.

31 In the Supreme Court of the District of Columbia, the —— day of ——, 18—. At Law. No. 14406. In Error.

THE DAVIS SEWING MACHINE COMPANY

vs.

ANDREW ROTHWELL and ALMARIN C. RICHARDS.

Know all men by these presents, that we, The Davis Sewing Machine Company, of Watertown, N. Y., and Joseph T. Stevens, of Washington, D. C., are bound unto the above-named Andrew Rothwell and Almarin C. Richards in the sum of two hundred and fifty dollars ($250), to be paid to the said Andrew Rothwell and Almarin C. Richards, his executors or administrators; to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our, and each of our, heirs, executors, and administrators, firmly by these presents. Sealed with our seals, and dated this 14th day of March, 1882.

Whereas the above named, The Davis Sewing Machine Company, has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above suit by the said supreme court of the District of Columbia:

Now, therefore, the condition of this obligation is that if the above named The Davis Sewing Machine Company shall prosecute its said writ to effect, and answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void; otherwise, the same shall be and remain in full force and virtue.

THE DAVIS SEWING MACHINE COMPANY,
OF WATERTOWN, N. Y. [SEAL.]
L. A. JOHNSON, *Treasurer.*
JOSEPH T. STEVENS. [SEAL.]

Sealed and delivered in presence of—
JAMES C. BURT.
HARRY M. PAYNE, as to the signature of J. T. Stevens.

Approved March 14th, 1882.

D. K. CARTTER,
Ch'f Justice.

32 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the chief justice and justices of the supreme court of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said court before you, between The Davis Sewing Machine Company, of Watertown, plaintiff, and Andrew Rothwell and Almarin C. Richards, defendants, a manifest error hath happened, to the great damage of the said plaintiff, as by its complaint appears; and it being fit that the error, if any hath happened, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, therefore you are hereby commanded, if judgment be therein given, under your seal, dis-

tinctly and openly, to send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the United States, this 14th day of March, in the year of our Lord 1882, and of the Independence of the United States the one hundred and sixth.

[SEAL.] R. J. MEIGS, *Clerk.*

DISTRICT OF COLUMBIA, *to wit:*

To Andrew Rothwell and Almarin C. Richards:

You are here hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the District of Columbia, wherein The Davis Sewing Machine Company, of Watertown, is plaintiff and you are defendants, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, so that speedy justice be done the parties in that behalf.

Witness D. K. Cartter, chief justice of the said supreme court of the District of Columbia.

D. K. CARTTER,
C. J. S. Court.

Service accepted.

COOK & COLE,
W. WHEELER,
Att'y for Def'ts.

14 Mar., '82.

33 AUTHENTICATION OF RECORD.

Clerk's Certificate.

CLERK'S OFFICE,
SUPREME COURT OF THE DISTRICT OF COLUMBIA.

I, Return J. Meigs, clerk of the said court, do hereby certify that the writings annexed to this certificate are true copies of originals on file and of record in said office, and that said originals, together, constitute the record of the proceedings of said court in this cause.

Witness my hand and the seal of said court, this 25th day of September, 1882.

[SEAL.] R. J. MEIGS, *Clerk,*
By J. JAY CAMP,
Assistant Clerk.

Justice's Certificate.

I, David K. Cartter, chief justice of said court, do certify the foregoing attestation by Return J. Meigs, clerk of the said court, to be in due form.

Witness my hand and seal, this 25th day of September, 1882.

D. K. CARTTER, [SEAL.]
Chief Justice.

Clerk's Certificate to Justice's Official Character.

I, Return J. Meigs, clerk of said court, do hereby certify that David K. Cartter, whose genuine signature is subscribed to the foregoing certificate, was, at the time of signing and attesting the same, chief justice of said court, duly commissioned and qualified.

Witness my hand and the seal of said court, this 25th day of September, 1882.

[SEAL.]

R. J. MEIGS, *Clerk*,
By J. JAY CAMP,
Assistant Clerk.

Endorsed on cover: District of Columbia sup. court. No. 314. The Davis Sewing Machine Company, of Watertown, N. Y., plaintiff in error, *vs.* Andrew Rothwell and Almarin C. Richards. Filed 7th October, 1882.

Supreme Court, U.S.
FILED
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JAMES H. MCKENNEY,
CLERK.

In the Supreme Court of the United States.

No. 314, of October Term, 1884.

THE DAVIS SEWING MACHINE COMPANY, of Watertown, New York, *Plaintiff in Error*,

vs.

ANDREW ROTHWELL AND ALMARIN C. RICHARDS, *Defendants in Error.*

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

Brief of Plaintiff in Error.

JAS. G. PAYNE,
For Plaintiff in Error.

R. O. POLKINHORN & SON, PRINTERS, WASHINGTON, D. C.

In the Supreme Court of the United States.

No. 314, of October Term, 1884.

THE DAVIS SEWING MACHINE COMPANY, of Watertown, New York, *Plaintiff in Error*,

vs.

ANDREW ROTHWELL AND ALMARIN C. RICHARDS, *Defendants in Error.*

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

Brief of Plaintiff in Error.

This suit is founded upon the guaranty of the defendants, which is set forth on page 9 of the printed record.

By this instrument the defendants, acknowledging the receipt of a valuable consideration, guaranteed to the plaintiff the full performance on the part of John W. Poler, of a certain contract (which is also set forth in the record on pages 8 and 9), and the payment by said Poler of "all indebtedness by account, note, endorsement of notes, including renewals and extensions or otherwise, to the plaintiff, for property sold to the said Poler under the contract, to the amount of three thousand dollars ($3,000)."

Upon the trial of the cause in the court below it appeared in proof that the contract referred to was signed by the

said John W. Poler, but not by plaintiff, at the time of the execution of the guaranty, that the execution of the contract on the part of Poler was witnessed by J. T. Stevens, the Washington attorney of the plaintiff, and that the guaranty being executed upon the same paper as the contract, was delivered by the defendants to Poler, and by him to the said Stevens (plaintiff's attorney), who endorsed upon the same his certificate of the responsibility of the sureties, and forwarded the contract and guaranty to the plaintiff, by whom the contract was then signed.

It further appeared in proof that between the execution of the said contract and guaranty and January, 1875, the plaintiff furnished to the said John W. Poler, Sewing Machines and property named and described in the contract, for which, in January, 1875, the said Poler was indebted to the plaintiff in the sum of twenty-seven hundred dollars ($2,700.00), and that about the said month of January, 1875, the plaintiff having made efforts to collect the said indebtedness from the said Poler and failing to do so, notified the defendants of the said indebtedness, and default and demanded payment from them, which was refused.

The court below instructed the jury that—

> "It appearing at the time defendants signed the guaranty on the back of the contract between the plaintiff and Poler, that the plaintiff had not executed the contract or assented thereto, and that the contract and guaranty related to prospective dealings between the plaintiff and Poler, and that subsequently to the signing thereof by the defendants, the attorney for the plaintiff approved the responsibility of the guarantors and sent the contract to Watertown, New York, to have the plaintiff, which subsequently signed it, and no notice having been given by the plaintiff to the defendants of the acceptance of such contract and guaranty, and that it intended to furnish goods thereon; and held the defendants responsible, the plaintiff cannot recover, and the jury should find for the defendants."

The jury below found for the defendants under the instruction of the court.

Assignment of Error.

1st. The court erred in assuming that at the time the defendants signed the guaranty the plaintiff had not executed the contract or assented thereto.

There is no evidence supporting the latter assumption (see the statement of proof contained on pages, 9 and 10 of the record), but on the contrary the execution of the contract by Poler is witnessed by Stevens, the Washington attorney of the plaintiff, who certifies to the responsibility of the guarantors, and sends the contract and guaranty to the plaintiff at Watertown, New York.

This evidence, we contend, establishes the assent of the plaintiff to the contract with Poler at the time of its execution by the latter, and of the execution of the guaranty by the defendants.

2d. The court erred in instructing the jury, that "no notice having been giving by the plaintiff to the defendants of the acceptance of the contract and guaranty, and that it intended to furnish goods thereon, and hold the defendants responsible, the plaintiff could not recover."

This was not a mere offer or proposal to guarantee, it was on the part of the defendants a complete and absolute undertaking; it is without any condition express or implied, except, as to price and terms of payment for the property sold, and the extent of the guaranty.

It expressed the receipt of a valuable consideration for which the defendants, *in terms*, then and there, guaranteed to the plaintiff two things:

1st. The full performance of the contract by Poler (the said contract being then executed by him).

2d. The payment by Poler of all indebtedness to the plaintiff for property sold to Poler under the said contract to the amount of three-thousand dollars ($3,000.00).

There was no condition that the defendants should have notice of the acceptance of the guaranty or contract.

The undertaking of the defendants was complete within the limit named. They guaranteed payment for the property described in the contract, which the plaintiff should sell to Poler, at the price and upon the terms as to discounts, and time and manner of payment, prescribed in the contract.

There could be no uncertainty on the part of the defendants as to the nature of the obligation they were assuming.

It will be claimed that this Court has held it to be necessary that notice of the acceptance of the guaranty be given to the guarantor, and the case of *Lee* vs. *Dick*, 10 Peters 482, may be relied upon.

That case, however, like others referred to in the opinion of the Court, rested upon an offer or proposal to guarantee, and no consideration was expressed or implied.

The rule established in these cases is founded upon the doctrine that acceptance of such an offer is essential to an inception of the contract (see *Louisville Mf'g Co.* vs. *Welch*, 10 How. 461–475), and that such an offer or proposal on the part of the guarantor does not become effective and binding as an obligation, until accepted by the party to whom it is made; that until then it is inchoate and incomplete and may be withdrawn by the proposer.

This rule cannot apply when the guaranty expresses a consideration.

Davis vs. *Wells*, 104 U. S., p. 165.

In the present case the guarantors could not revoke the guaranty after its execution. Upon its delivery their obli-

gation was complete and no longer within their control, except as limited and defined by its terms.

This is a test which distinguishes the present case from that of *Lee* vs. *Dick*, *supra*, and the others referred to.

Nor does it matter as to the extent or character of the expressed consideration. One merely nominal is sufficient.

Lawrence vs. *McCalmont*, 2 How., 426–452.
Dutchman vs. *Tooth*, 5 Bing. new cases, 577.

A case of comparatively recent decision in this court, *Davis* vs. *Wells*, 104 U. S. 159, holds the rule of law as we contend.

There the guaranty expressed the consideration to be one dollar and unconditionally guaranteed the indebtedness of Gordon & Co. for overdrafts on the guarantor then made, or *that might thereafter* be made, to the extent of ten-thousand dollars (10,000.00).

It was delivered to Gordon & Co., and by them to the guarantor.

The court held that this was not an unaccepted proposal, but a completed contract, of the acceptance of which no notice was required.

Nor, we submit, does it make any difference that the contract between Poler and the plaintiff was not signed by the latter at the time of the execution of the guaranty, so far as the indebtedness of Poler for property sold to him by the plaintiff is concerned.

The contract specifies the property which the plaintiff might sell to Poler, and the prices at which and terms upon which, the same should be paid for.

The defendants guarantee to the plaintiff the payment of all indebtedness for such property so sold to said Poler to the extent of three-thousand dollars (3,000.00).

The plaintiffs did sell such property to Poler at the prices provided in the contract, and in January, 1875, Poler was

indebted to the plaintiff for the property so sold to him in the sum of twenty-seven-hundred dollars ($2,700.00), which he did not pay.

Here is the default against which the defendants undertook in express and unconditional terms, to secure the plaintiff.

Suppose the defendants had said, "for value received we hereby guarantee to the Davis Sewing Machine Company the payment by John W. Poler of all indebtedness to the said Davis Sewing Machine Company for sewing machines, parts thereof, accessories thereto, etc., which the said Davis Sewing Machine Company shall sell to said John W. Poler at a discount of 40 per cent from the regular retail prices at date of shipment, and payable in six months from date of invoice, to the extent of three-thousand dollars."

This is just what the defendants undertook to do, and this is just what we ask they shall be required to do.

See the authorities hereinafter cited.

While it is true that the earlier cases in this Court apparently determined the law to be in favor of the requirement of notice of acceptance of the guarantee before the guarantors can be held liable, and that the lead of this Court in that direction has been followed by some of the State Courts, a careful examination of the cases will disclose several important facts:

1st. That the instrument sued on in most instances was, in reality, a mere offer or proposal to guarantee an expression of willingness to do so, and not a direct promise or undertaking.

2d. That these decisions are not supported by English authority. In *Douglas* vs. *Reynolds*, Justice Story cites two English cases only; and neither of these we submit sustains the doctrine enunciated in his opinion.

In the cases decided by the Court through Justice Marshall, no English cases are cited.

3d. That the dictum of Justices Marshall and Story have not been followed in all of the States, the exceptions including those States which are essentially commercial in their transactions. In New York, a State of this character, the courts, beginning with the case of *Whitney* vs. *Grote*, 24 Wendell, p. 82, and followed soon after by the case of *Smith* vs. *Dana*, 6 Hill, 543, held the doctrine to be, as we contend, that no notice of the acceptance of such a guaranty was necessary. The same ruling was had in the case of the *Union Bank* vs. *Cosling*, 3d Comstock, p. 203, which was a suit brought on a general letter of credit.

In the case of *Van Leer* vs. *Crawford*, Second Swan, 117, the Supreme Court of Tennessee intimated, in strong terms that an instrument of guaranty in these wo rds—

> "I hereby do guarantee the payment of any contract that Sam. Lanier may make for the hire of negroes during the year 1849 to be used at his Iron Works or any Iron Works in which he may be interested in Decatur or Perry County, Tennessee"—

would be obligatory upon the guarantors without notice of acceptance. And in the case of *Bright* vs. *McKnight*, First Sneed 159, the same court, after discussing the apparent conflict of authorities upon this question in this country, held the true doctrine to be, that an absolute present guaranty complete in its terms and fixing the liability of the grantor, takes effect as soon as it is acted upon, and that no notice of acceptance of such a guaranty is necessary.

In the case of *Drummond* vs. *Prutman*, 12 Wheaton 515, the Supreme Court of the United States held, that—

> "The guarantor shall be held bound to the full extent of what appears to be his engagement; and the

rule, in expounding these undertakings, is that the words of the guaranty are to be taken as strongly against the guarantor as the sense will admit."

The same doctrine is laid down in Fell on Guaranty, Chap. 5, p. 127, and 12th East. 227.

In the consideration of this question it should be remembered that it is in the power of the guarantor, if he so desire, to make his obligation dependant upon notice, demand or any other condition he may see proper for his own protection and safety.

It is also within the power of the guarantor, knowing the nature of the obligation into which he has entered, and the nature of the liability he has incurred, to make inquiry at any time and ascertain the exact condition of that liability for his own guidance and protection.

In the case of *Mitchell* vs. *McCleary*, 42 Md., p. 374, the Court of Appeals of Maryland held an averment in the declaration; "that a defendant on the day of the execution of a certain lease and as part thereof, and prior to and as a condition precedent to the making of the same, and of a delivery of the property, guaranteed in writing, unto the plaintiff, that the lessee, or intended lessee would pay to the said McCleary annually the rent of $400.00 in installments of $200 00 on certain days in each year," was not demurrable but was good; further holding that it was an absolute guaranty, and it was quite clear upon all the authorities that in such a case no notice of the acceptance of the guaranty was required to make the guarantor liable.

The same doctrine is laid down in *Caton* vs. *Shaw* and others, 2d. Harris and Gill, p. 22.

Nabb vs. *Koontz*, 17 Md., 288.

In *Case & Co.* vs. *Howard*, 41 Iowa, 479, the Supreme Court of that State held a guaranty in the following form:

"If D. A. Hills purchases a case of tobacco on credit, I agree to see the same paid for in four months," to be an absolute guaranty requiring no notice of acceptance to bind the guarantor, affirming the previous rulings of the same court, especially in the case of *Carman* vs. *Elledge*, in 40 Iowa, 409.

In the case of *Bushnell* vs. *Church, et al.*, 15 Conn., 406, the facts were these:

There was an agreement made and executed on the part of William Church, whereby he agreed to pay Bushnell a certain sum per ton for all the iron ore the said Bushnell should dig and raise from a certain ore bed, not exceeding 600 tons, and which the said Church should be able to sell and take away by a certain date, payment to be made upon that date.

This agreement was signed by Church, and upon the same paper the defendants executed a guaranty in the following words, "we agree to warrant the performance of the within and above contract on the part of the said William."

The contract was signed by William Church, (with the guarantee executed thereon;) was then delivered to a third person to be delivered to Bushnell, by whom it appears to have been subsequently executed.

The work was done, and William Church failed to pay according to the contract.

In an action upon the guaranty, the Supreme Court of Errors of the State of Connecticut held, that the delivery of the writings to Bushnell constituted the consummation of the contract, and no notice of the acceptance of the guaranty was necessary to perfect the right of action.

In each of these cases the Court draws a marked line of distinction between a mere offer or proposal to guarantee, and a complete, absolute undertaking, such as that upon which the present suit is brought.

In the following, among many other American cases, in addition to those already cited, it is distinctly held that notice of the acceptance of a guaranty in terms similar to that of the case at bar, is not required.

Davis Sewing Machine Co. vs. *Jones*, 61st Mo., 409;
Wadsworth vs. *Allen*, 8th Grattan, 174–178;
Matthews vs. *Chrisman*, 12th Smedes & Marshall, 595;
Sanders vs. *Etcherson*, 36th Georgia, 404.

It is conceded that the defendants did have express notice before suit was brought, to wit, in January, 1875.

It is important to the trade and enterprise of the commercial world that these undertakings or contracts of guaranty should not be so clogged by technical requirements as to defeat the obvious intent of the parties.

They should be treated as merchantile instruments and liberally construed according to the meaning and intention of the parties.

See *Davis* vs. *Wells*, *supra*.

We contend that in the present case the intention of the parties was clearly that of immediate, defined, responsibility. We respectfully submit that the judgment below should be reversed and a new trial ordered.

JAS. G. PAYNE,
For Plaintiff in Error.

FILED
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JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1885.

THE DAVIS SEWING MACHINE COMPANY,
PLAINTIFF IN ERROR.

vs.

GEORGE L. SHERIFF, AND ALMARIN C. RICHARDS,
EXECUTORS OF THE LAST WILL AND TESTAMENT OF ANDREW ROTHWELL, DECEASED; AND ALMARIN C. RICHARDS.

UPON A WRIT OF ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

BRIEF IN BEHALF OF THE APPELLEES.

W. A. COOK,
C. C. COLE,
Attorney's for Defendants.

Supreme Court of the United States.

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UPON A WRIT OF ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

BRIEF IN BEHALF OF THE APPELLEES.

STATEMENT OF THE CASE.

The plaintiff in error was plaintiff below. The action was brought upon an alleged contract of guarranty signed by Andrew Rothwell and Almarin C. Richards. During the pendency of the case in this court the said Rothwell died. George L. Sheriff, and the defendant Richards, have qualified as his executors and have entered their appearance in this court.

The trial before the jury took place at a special term of the court below, on the 25th and 26th days of February,

1879, (see record pp. 6 & 7,) and resulted in a verdict and judgment for the defendant.

The contract of guaranty sued upon, was written at the foot of and on the same paper with the contract between the plaintiff and one John W. Poler, performance of which, it is claimed, the defendants guarantied on the part of said Poler. It is in the following language:

"For value received, we hereby guarantee to the Davis Sewing Machine Company, of Watertown, N. W., (doubtless intended for N. Y.,) the full performance of the foregoing contract on the part of John W. Poler and the payment by said John W. Poler, of all indebtedness, by account, note, endorsement of notes (including renewals and extensions,) or otherwise to the said Davis Sewing Machine Company, for property sold to said John W. Poler, under this contract, to the amount of three thousand ($3,000) dollars. Dated Washington, D. C. this 17th day of December, 1872". (See record p. 9.

This is signed by the defendants, but not sealed.

The contract referred to in the guaranty was one, which was offered in evidence and found in the record (pp. 8 and 9) purports to have been made between the plaintiff and said Poler, on the 17th day of December, 1872.

But the plaintiff's evidence showed that the alleged contract had not been signed by the plaintiff, at the time the defendants signed the guaranty, and was not executed by it until some time afterwards. It appears on the face of the paper that two days after the guarranty was signed, it was presented to J. T. Stevens, the attorney for the plaintiff in Washington, who endorsed a recommendation that the sureties were responsible. The plaintiff's evidence further showed that after that time the contract and guaranty were forwarded by Stevens to the plaintiff, and the agreement was *afterwards* signed by it

(See record p. 9.) And the proof of the defendant showed that the contract and guaranty, unsigned by the plaintiff, were delivered by defendants, after signing, to Poler, and he delivered it to Stevens, the then Washington attorney of plaintiff, and it was forwarded by Stevens to plaintiff with a recommendation that the guarantors were good, and the plaintiffs subsequently executed the contract. (See p. 10 of the record.)

The contract between the plaintiff and Poler is one of mutual covenants, they agreeing to furnish him certain machines and other goods at certain prices, and to allow him certain discounts for early payments, and Poler agreed to receive the goods to be furnished and introduce and sell them, and pay at specified times and in a specified manner. The contract is one that could not be binding upon either party until signed by both. It thus conclusively appears that there was no contract between the plaintiff and Poler at the time of the signing of the guaranty. *The plaintiff had not then agreed to furnish Poler any goods whatever. It was waiting to receive from him his proposal of terms, and guaranty he offered for due performance on his part.*

It is also clear from the face of the contract, that it and the guaranty related wholly to *prospective* transactions between the parties. The language of the contract is that "it is agreed that all sales of sewing machines &c., * * * * * * * * which the Davis Sewing Machine Company, * * * * * * * shall make to John W. Poler * * * * shall be upon the terms and conditions following." &c., (See first ten lines of contract, p. 8 of the record.) In addition to that, the defendants proved "that at the time of the execution of the alleged guaranty by the defendants, the plaintiff had furnished

no goods or merchandize to said Poler, and that *the negotiations then pending* between Poler and plaintiff related to *prospective transactions* between them." This is shown by the bill of exceptions (see record p. 10.)

It is clear that under the foregoing state of facts that the guaranty written on the incomplete contract was only *an offer* on the part of the guarantors, to become responsible for the performance by Poler of the stipulations on his part, if the plaintiff should see fit to furnish him the goods on the terms of the proposed contract, and accept them as guarantors thereof. At the time the paper was sent by Stevens to the plaintiff it is evident that it had not determined to do either; for there is no evidence tending to show that the plaintiff had at that time any knowledge whatever of the terms of the proposed contract; and the record shows affirmatively that they had no knowledge concerning the responsibility of the proposed guarantors until they received Steven's recommendation written on the same paper with it.

The plaintiff proved that it furnished Poler certain goods under the contract and that he was indebted to it in the sum of about $2,700 but gave no evidence tending to show that it *ever notified* the defendants that it had made or completed the contract with Poler, or would furnish him goods on the faith of the guaranty. But the defendants proved that they "were *never notified* of the execution of the said contract by the plaintiff or the acceptance by it of the proposed guaranty; and that they never had any notice or knowledge whatever that plaintiff furnished said Poler any goods or merchandize in pursuance of such contract, or on the faith of said guaranty, until the month of January, 1886," after the dealings between plaintiff and Poler had ceased and he

had failed to pay the balance due from him on demand. (See record p. 10.)

There was no evidence tending to show that there was any consideration passed between plaintiff and defendants, or that there was any other consideration for their supposed guaranty, than the expected future advances by the plaintiff to Poler.

On this state of facts, after the evidence was closed, the justice presiding at the trial, on motion of the defendants' counsel, instructed the jury as follows:

"It appearing that at the time the defendant signed the guaranty on the back of the contract between the plaintiff and Poler, that the plaintiff had not executed the contract or assented thereto, and that the contract and guaranty related to prospective dealings between the plaintiff and Poler, and that subsequently to the signing thereof by the defendants, the attorney for the plaintiff approved the responsibility of the guarantors, and sent the contract to Watertown, N. Y., to the plaintiff; which subsequently signed it; and no notice having been given by the plaintiff to the defendant of the acceptance of such contract and guaranty, and that it intended to furnish goods thereon and hold the defendants responsible, the plaintiff cannot recover, and the jury should find for the defendant." (See pp. 10 and 11 of the record.)

Thereupon a verdict and judgment were given for the defendants.

The case was heard at a General Term of the Court below upon appeal, and the judgment affirmed on the 17th day of May, 1880. (See p. 11 of the record.)

The writ of error from this court was sued out on the 14th day of March, 1882.

Points in Favor of Sustaining the Ruling Below.

The only question presented by the bill of exceptions is the correctness of the instruction above recited of the presiding justice to the jury, in point of law.

The evidence raised no question or controversy about the facts recited in the instruction, so there was nothing for the jury to pass upon. The bill of exceptions states that these facts *were proved.*

THE INSTRUCTION GIVEN THE JURY WAS CORRECT.

There can be no doubt that the justice presiding at the trial stated the law to the jury, in strict accordance with the existing decisions of this court.

Russell v. Clarke, 7 Cranch, 69;
Edmonston v. Drake, 5 Peters, 624;
Douglass v. Reynolds, 7 Peters, 113;
Lee v. Dick, 10 Peters, 482;
Adams v. Jones, 12 Peters, 207;
Reynolds v. Douglass, 12 Peters, 497;
Louisville M'f'g Co, v. Welch, 10 How., 461.

In *Adams* v. *Jones*, the opinion of the court by Mr. Justice Story, states upon the point in question as follows: "And the question which, under this view, is presented, is whether, upon a letter of guaranty, addressed to a particular person, or to persons generally, for a future credit to be given to the party in whose favor the guaranty is drawn, notice is necessary to be given to the guarantor that the person giving the credit has accepted or acted upon the guaranty and given the credit on the faith of it. We are all of the opinion that it is necessary; and this is not now an open question in this court after the decisions which have been made:" citing most of the cases above referred to, and giving the reasons for the rule.

If the facts and circumstances of this case are such as to make the rule announced in the above cited cases applicable, of course they are conclusive of the correctness

of the action of the court below. That the facts of the case do bring it clearly within the doctrine of those cases, seems too plain for extended argument. Indeed, the clear inference is, that when this case was first decided below, the counsel for the plaintiff in error supposed that the court below had properly followed those cases, for although the judgment of the General Term affirming the ruling of the justice presiding at the trial, was pronounced on the 17th day of May, 1880, the writ of error from this court was not sued out until the 14th day of March, 1882, nearly two years afterwards, and very soon after the opinion of this court in the case of *Davis* v. *Wells*, 104 U. S., 159, was promulgated. It would seem that it was supposed by counsel for plaintiff that that opinion altered or modified the former rulings of this court upon that subject. But in that case "the reason and foundation of the rule, and * * * * the circumstances in which it is applicable," were only more fully and clearly stated, than they had been in earlier cases. (See 104 U. S., p. 164.) Those cases were referred to with approval, the rule itself recognized, and the exceptions to it distinctly pointed out. It was held that the particular language and circumstances of the guaranty in that case made it an exception to the rule requiring notice of the acceptance of the guaranty. The very reasoning which demonstrated that that case was without the rule requiring notice, shows that this one is within it. The words of the guaranty in that case were as follows:

"*For and in consideration of one dollar to us in hand paid by Wells, Fargo & Co., (the receipt of which is hereby acknowledged,)* we hereby guarantee unto them, the said Wells, Fargo & Co., *unconditionally at all times*, any indebtedness of Gordon & Co., a firm now doing business at Salt Lake City, Territory of Utah, to the extent of,

and not exceeding the sum of ten thousand dollars ($10,000) for any over drafts *now made*, or that may hereafter be made at the bank of said Wells, Fargo & Co.

"This guaranty to be an open one, *and to continue one at all times* to the amount of ten thousand dollars, *until revoked by us in writing.*

"Dated, Salt Lake City, 11th November, 1874.

"In witness whereof we have hereunto set our hands *and seals* the day and year above writen.

'ERWIN DAVIS. [SEAL.]
"J. N. H. PATRICK. [SEAL.]

"Witness: J. Gordon."

(See 104 U. S., 160.)

There is no similarity between the *form* or *legal effect* of the guaranty in that case and in the present one.

It appeared that Gordon & Co., were indebted to Wells, Fargo & Co., in the sum of over $9,000 at the time of giving the guaranty.

The syllabus of the case on the point in question is as follows:

"The rule, requiring notice by the guarantee of his acceptance of a guaranty and his intention to act under it, applies only where the instrument being, in legal effect, merely an offer or proposal, such acceptance is necessary to that mutual assent, without which there can be no contract."

In the opinion of the court at page 164, it is said:

"There seems to be some confusion as to the reason and foundation of the rule, and consequently some uncertainty as to the circumstances in which it is applicable. In some instances it has been treated as a rule, inhering in the very nature and definition of every contract, which requires the assent of a party to whom a proposal is made, to be signified to the party making it, in order to constitute a binding promise; in others, it has been considered as a rule springing from the peculiar nature of the contract of guaranty, which requires, after

the formation of the obligation of the guarantor, and as one of its incidents, that notice should be given of the intention of the guarantee to act under it, as a condition of the promise of the guarantor.

"The former is the sense in which the rule is to be understood as having been applied in the decisions of this court. * * * *

"*The agreement to accept is a transaction between the guarantee and guarantor, and completes that mutual assent necessary to a valid contract between them.* It was in the case cited, (*Wildes* v. *Savage*, 1 Story, 22,) the consideration for the promise of the guarantor. And wherever a sufficient consideration of any description passes directly between them, it operates in the same manner and with like effect. It establishes a privity between them and creates an obligation. The rule in question proceeds upon the ground that the case in which it applies *is an offer or a proposal on the part of the guarantor, which does not become effective and binding as an obligation until accepted by the party to whom it is made; that until then, it is incohate and incomplete, and may be withdrawn by the proposer.*"

The principle here announced furnishes a good test for the case at bar.

When the guaranty was signed in Washington by the guarantors, the guarantee had furnished no goods to Poler, and had not signified its willingness or intention of so doing, upon the basis of the paper which afterwards became a contract between it and Poler, or on any other conditions whatever. As the proposed contract between those parties was then "incohate and incomplete," the guaranty thereof must of necessity have been so. The latter could not have become a complete and binding obligation under the circumstances until the former did. The instrument as it left the hands of Poler and went through the hands of Stevens to the plaintiff, was simply an offer or proposition, in legal effect, by Poler to pur-

chase goods on the basis of the instrument, and an offer on the part of the guarantors to become bound for his performance, if the plaintiff would accept the offers. That either Poler or the guarantors might have withdrawn their respective propositions before acceptance and notice, seems clear beyond question. The only consideration for the guaranty was the proposed giving of credit by the guarantee to Poler. Where this is the case, in order to dispense with notice of acceptance, the guaranty must be made *at the request of the guarantee, and the agreement to accept*, which always, by implication, if not expressly, accompanies the request, *forms the consideration for the promise by the guarantor.* Now, in the case under consideration, the plaintiff never requested the defendants to make the guaranty. It does not appear that plaintiff ever heard of defendants, or knew anything of them, until it received their guaranty written on the proposed contract with a recommendation by Stevens that they were good. Subsequently plaintiff *agreed with Poler* to furnish him goods on the basis of his proposed contract, but it never *agreed with defendants* to do so, or to accept their guaranty; and the only way to have consummated such agreement between plaintiffs and defendants under the facts of this case was for the former to have notified the latter that it had received their guaranty and accepted it, and would furnish Poler goods on the faith of it. There never was any contract completed between them.

This principle is cogently stated in the opinion in *Davis* v. *Wells* in the following language:

"If the guaranty is made at the request of the guarantee, it then becomes the answer of the guarantor to a proposal made to him, and its delivery to or for the use of

the guarantee completes the communication between them and constitutes a contract. The same result follows, as declared in *Wildes* v. *Savage*, (*Supra*) where the agreement to accept is contemporaneous with the guaranty, and constitutes its consideration and basis. It must be so wherever there is a valuable consideration, other than the expected advances to be made to the principal debtor, which at the time the undertaking is given, passes from the guarantee to the guarantor, and equally so where the instrument is in the form of a bilateral contract, in which the guarantee binds himself to make the contemplated advances, or which otherwise creates, by its recitals, a privity between the guarantee and guarantor; for in each of these cases the mutual assent of the parties to the obligation is either expressed or necessarily implied."

The paragraph above quoted gives the cases of exception to the rule requiring notice of acceptance, and it is clear that the case now before the court does not come within any of them, because:

First.—The guaranty was not made at the request of the guarantee.

Second.—The agreement to accept was not contemporaneous with the guaranty.

Third.—There was no consideration, other than the expected advances, passing from the guarantee to the guartors, at the time the undertaking was given, or at any other time.

Fourth.—The instrument of guaranty sued on is not in the form of a bilateral contract, and at the time, or before it was signed by the guarantors, the guarantee did not bind itself to make contemplated advances.

Fifth. The contract sued on, does not by its recitals create a privity between the guarantee and guarantors, While it recites that the guaranty is given "for value received" it does not state what the value was, or from

whom received. It does not *by its terms bring the parties together, or show any completed transaction between them.*

It was competent to show by parol what the value recited in the guaranty was and from whom received. There was no objection made to this, and the evidence introduced, showed the state of facts set forth in the bill of exceptions, and recited in the instructions of the court to the jury. It showed that the guaranty in this case was in "legal effect," an offer or proposal on the part of the guarantors, the same as if it had been in the form of a letter from them to plaintiff, reciting that they were informed that Poler desired to obtain goods from them on certain terms, and agreeing to be responsible therefor in the language of the guaranty sued on.

In *Davis v. Wells*, page 167 of the report, the opinion proceeds as follows: "And on the supposition that the terms of the instrument constitute a mere offer to guarantee the debt of Gordon & Co., we accept the conclusion (that notice was required) as entirely just.

"But we are unable to agree to that supposition. We think the instrument sued on is not a mere unaccepted proposal. It carries upon *its face conclusive evidence that it had been accepted* by Wells, Fargo, & Co., and that it was understood and intended to be, on delivery to them, as it took place, a complete and perfect obligation of guaranty. That evidence we find in the words 'for and in consideration of one dollar to us paid by Wells, Fargo, & Co , the receipt of which is hereby acknowledged, we hereby guarantee,' &c. How can the recital be true, unless the covenant of guaranty had been made with the assent of Wells, Fargo & Co., communicated to the guarantors? Wells, Fargo & Co., had not only assented to it, but had paid value for it, and that into the very hands of the guarantors, as they by the instrument itself acknowledged."

After holding that the fact that the recited considera-

tion was nominal could make no difference, as its main office was to create a privity between the contracting parties, it is further said on page 168 of the report.

"It cannot therefore, be treated as if it were an engagement in which the only consideration was the future credit solicited and expected. The recital of the consideration *paid by the guarantee to the guarantor* shows a completed contract, based upon the mutual assent of the parties." It was also said in that case that the words "unconditionally, at all times," in the body of the guaranty might well be held a waiver of notice of acceptance if one were required.

The particular language of the guaranty in *Davis* v *Wells*, the facts and circumstances of the case, and the reasons given in the opinion, all concur in showing that that case is not a precedent for this.

The guaranty in the case now before the court, is, under the circumstances shown in the evidence, in "legal effect," like the guaranties in

Lee v. Dick, 10 Peters, 482, and
Reynolds v. Douglass, 12 Peters, 497,

where notice of acceptance was held necessary. The guaranty in the first of these cases was as follows:

"MEMPHIS, *September 24th, 1832.*

"MESSRS. N. AND J. DICK & Co.:

"GENTLEMEN:—Nightengale and Dexter, of Maury County, Tennessee, wish to draw on you at six or eight months date. You will please accept their draft for $2,000, and *I do hereby guarantee the punctual payment of it.*

"Very respectfully your obedient servant.

"SAMUEL B. LEE."

In the second it was as follows:

"PORT GIBSON, *27th December, 1827.*

"MESSRS. REYNOLDS, BYRNE & Co.:

"GENTLEMEN:—Our friend, Mr. Chester Haring, to assist him in business, may require your aid from time to time, either by acceptances or indorsements of his paper, or advances in cash. In order to save you from harm in so doing, *we do hereby bind ourselves severally and jointly to be responsible to you, at any time, for a sum not exceeding $8,000, should the said Chester Haring fail to do so.*

"Your obedient servants,

"JAMES S. DOUGLASS,
"THOMAS G. SINGLETON,
"THOMAS GOING."

In this case it appears from the face of the contract and guaranty that they related wholly to prospective transactions as fully as the same appears by the guaranties in those cases. This fact was also conclusively shown by parol proof, as it was competent to do. And the Davis Sewing Machine company had not, at the time the defendants signed the guaranty, agreed to furnish Poler the goods, or to accept the guaranty. In this particular also, it is like the two cases last cited. The only difference is that in those cases there is nothing to show whether such acceptance and agreement had been previously or was contemporaneously made. But the cases were treated as if no such agreement or acceptance was shown. In the present case, it was indisputably shown by parol testimony, that the guarantee had not bound himself at the time, or requested or agreed to accept the guaranty, nor at any time indicated to the defendants any purpose ever to do so.

The present case is also like those, in that no consideration passed between the guarantors and guarantees; but the only consideration was the expected future advances.

No reason is perceived why the rule announced in those cases does not apply in this. And the opinion that it does apply is strengthened by the reasoning found in *Davis v. Wells.*

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